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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 12-14300-alg

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In the Matter of:

HMX ACQUISITION CORP., et al.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

November 20, 2012

2:38 PM

B E F O R E:

HON. ALLAN L. GROPPER

U.S. BANKRUPTCY JUDGE

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Hearing RE: Motion by Debtors authorizing the Debtors' entry into the stalking-horse purchase agreement, authorizing and approving the bidding procedures and breakup fee.

Hearing RE: Motion by Debtors authorizing to obtain secured postpetition financing and use cash collateral; granting adequate protection and modifying the automatic stay.

Transcribed by: Penina Wolicki
eScribers, LLC
700 West 192nd Street, Suite #607
New York, NY 10040
(973)406-2250
operations@escribers.net

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A P P E A R A N C E S :

PROSKAUER ROSE LLP

Attorneys for Debtors
Three First National Plaza
70 West Madison
Suite 3800
Chicago, IL 60602

BY: MARK K. THOMAS, ESQ.

PROSKAUER ROSE LLP

Attorneys for Debtors
Eleven Times Square
New York, NY 10036

BY: JARED D. ZAJAC, ESQ.

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UNITED STATES DEPARTMENT OF JUSTICE

Office of the United States Trustee

33 Whitehall Street

21st Floor

New York, NY 10004

BY: NAZAR KHODOROVSKY, ESQ.

LEONARD, STREET AND DEINARD, P.A.

Proposed Counsel for Official Creditors' Committee

150 South Fifth Street

Suite 2300

Minneapolis, MN 55402

BY: ROBERT T. KUGLER, ESQ.

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DLA PIPER LLP (US)

Attorneys for Authentic Brands Group

203 North LaSalle Street

Suite 1900

Chicago, IL 60601

BY: CHUN I. JANG, ESQ.

DANIEL M. SIMON, ESQ. (TELEPHONICALLY)

KENNEDY, JENNIK & MURRAY, P.C.

Attorneys for Workers United

113 University Place

New York, NY 10003

BY: SUSAN M. JENNIK, ESQ.

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GREENBERG TRAURIG, LLP

Attorneys for Salus Capital Partners LLC

200 Park Avenue

Florham Park, NJ 07932

BY: JEFFREY M. ROSENTHAL, ESQ.

GREENBERG TRAURIG, LLP

Attorneys for Salus Capital Partners LLC

333 S.E. 2nd Avenue

Suite 4400

Miami, FL 33131

BY: PAUL J. KEENAN, JR., ESQ.

SCHULTE ROTH & ZABEL LLP

Attorneys for Amalgamated Health Fund

919 Third Avenue

New York, NY 10022

BY: LAWRENCE V. GELBER, ESQ.

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HALPERIN BATTAGLIA RAICHT, LLP

Attorneys for Douglas Williams

555 Madison Avenue

9th Floor

New York, NY 10022

BY: ALAN D. HALPERIN, ESQ.

JULIE D. DYAS, ESQ.

LAZARUS & LAZARUS, P.C.

Attorneys for Warren Corporation, Loro Piana, and HMS

240 Madison Avenue

New York, NY 10016

BY: HARLAN M. LAZARUS, ESQ.

ALSO PRESENT:

GEOFFREY A. RICHARDS, William Blair & Company

1 P R O C E E D I N G S

2 THE COURT: Please be seated. May I have appearances
3 in HMX, please?

4 MR. THOMAS: Good afternoon, Your Honor. Mark Thomas
5 of Proskauer, with my colleague, Jared Zajac, on behalf of HMX
6 Acquisition and its affiliated debtors and debtors-in-
7 possession.

8 MR. ROSENTHAL: Do you want podiums Your Honor, or --

9 THE COURT: No, you can --

10 MR. ROSENTHAL: Thank you, Your Honor. Jeffery M.
11 Rosenthal, Greenberg Traurig, on behalf of Salus Capital. And
12 I believe Mr. Keenan, my colleague, is on the phone as well,
13 Your Honor.

14 THE COURT: All right.

15 MR. JANG: Good afternoon, Your Honor. Chun Jang of
16 DLA Piper, on behalf of Authentic Brands Group, the stalking-
17 horse bidder.

18 MR. KUGLER: Good afternoon, Your Honor. Robert T.
19 Kugler from Leonard, Street and Deinard on behalf of the
20 official committee of unsecured creditors.

21 MR. KHODOROVSKY: Nazar Khodorovsky for the U.S.
22 Trustee. I wanted to indicate to Your Honor, it's a pleasure
23 to appear before Your Honor in this courthouse again. Thank
24 you, Your Honor.

25 THE COURT: Well, how are you doing in terms of an

1 office? Has your office reopened?

2 MR. KHODOROVSKY: No, Your Honor.

3 THE COURT: Not yet?

4 MR. KHODOROVSKY: I've been working out of the
5 Brooklyn office, Your Honor.

6 THE COURT: All right.

7 MR. KHODOROVSKY: Thank you, Your Honor.

8 THE COURT: A lot of people think that's a promotion.

9 MR. KHODOROVSKY: Your Honor, I'd been working in the
10 Brooklyn office even before the hurricane, as well. Thank you,
11 Your Honor.

12 MS. JENNIK: Good afternoon, Your Honor. Susan Jennik
13 of Kennedy, Jennik & Murray, for Workers United.

14 THE COURT: All right. Anybody who wants -- going to
15 speak, should stay up here. There are plenty of seats.

16 MR. LAZARUS: Good afternoon, Your Honor. Harlan
17 Lazarus, for creditors Warren Corporation, Loro Piana, and HMS.

18 THE COURT: What are their positions in this case?

19 MR. LAZARUS: Creditors -- large creditors.

20 THE COURT: Trade creditors?

21 MR. LAZARUS: Yes, Your Honor.

22 THE COURT: All right.

23 MR. HALPERIN: Good afternoon, Your Honor. Alan
24 Halperin, my colleague Julie Dyas, on behalf of Doug Williams.

25 THE COURT: And Mr. Williams is the CEO of the

1 debtors?

2 MR. HALPERIN: Yes, he is, Your Honor.

3 THE COURT: And has a lot of other interests too,
4 apparently. Well, why don't you sit up front.

5 Anyone else going to appear? Anyone on the telephone
6 wish to note an appearance?

7 All right. Where shall we start today?

8 MR. THOMAS: Your Honor, Mark Thomas on behalf of the
9 debtors. If I may? We are here basically on the final hearing
10 on the debtor-in-possession financing order and a status
11 hearing on the bid procedures order. The committee filed two
12 objections late last night. We have worked diligently with the
13 committee and our senior secured lender since last night to try
14 to resolve all of the objections that were raised.

15 Your Honor, I'm happy to report that the committee,
16 the debtors, and the proposed DIP lenders have reached an
17 agreement on a final DIP financing order that resolves all of
18 the objections that the committee raised last night. And I
19 would like to, if I could, walk you through a blackline of the
20 order.

21 THE COURT: All right. Well, why don't we start,
22 then, with the status conference on the bidding procedures
23 order.

24 MR. THOMAS: Okay.

25 THE COURT: And you can tell me where we are and where

1 you hope to get and when.

2 MR. THOMAS: Certainly, Your Honor. We have worked
3 with the committee and the stalking-horse bidder's counsel and
4 the proposed DIP lender's counsel in an attempt to resolve all
5 of the objections that the committee raised. We have addressed
6 many of the objections and have an agreed order that we could
7 tender that addresses the objections. But there are four
8 outstanding issues that we haven't been able to resolve since
9 last night.

10 And I'll tell you those issues. And on behalf --

11 THE COURT: If you think it would be useful, yes,
12 please. And then I'll tell you -- it may encompass my
13 questions --

14 MR. THOMAS: All right.

15 THE COURT: -- because this is really the first time
16 we're meeting face-to-face on any of these issues.

17 MR. THOMAS: Right. And with respect to the open
18 issues, as we've discussed with the creditors' committee, the
19 debtors are prepared today, if need be, to put on evidence.
20 We've brought witnesses --

21 THE COURT: Well, you told me you wanted a status
22 conference. So I gather we won't need to have evidence. We're
23 going to put off the final hearing or the hearing until next
24 week, I assume?

25 MR. THOMAS: Well, Your Honor, this is -- this was

1 originally set for status on Friday the 16th of November. And
2 since the committee had just been appointed, they -- the status
3 was to hear their objections. They hadn't had time to file
4 objections.

5 THE COURT: All right.

6 MR. THOMAS: So I believe this is a continued status
7 hearing on the bid procedures to hear their objections. Our
8 senior secured lenders had advised us that in the absence of a
9 fully resolved bid procedures order today, that they were in a
10 position to call a default under the interim DIP financing, and
11 cease financing, and therefore admonished --

12 THE COURT: Well, we might as -- we can go into
13 liquidation immediately if that's what they wish. If they want
14 to play chicken with the Court and not give the committee an
15 opportunity to do so, and that's how they do business in Miami,
16 we can go into liquidation today.

17 MR. THOMAS: Which is --

18 THE COURT: Is that what the DIP lender wants?

19 MR. ROSENTHAL: Your Honor, no, that's not what we
20 want. I'm a little con --

21 THE COURT: All right. I'm glad to hear that.

22 MR. ROSENTHAL: Well, I'm a little confused, because I
23 live in New Jersey and practice in New Jersey and New York, not
24 Miami.

25 THE COURT: All right. Okay.

1 MR. ROSENTHAL: Number one. Number two, we have
2 worked hard with the committee the last three or four days to
3 get a final DIP order in position and ready to go. We also had
4 understood that everybody was working towards a final bid
5 procedures order for today. And we've gotten close. As I
6 understand it, there are three open issues on that order.
7 So --

8 THE COURT: Well, I'll hear them. Maybe we're closer
9 than I think we are.

10 MR. ROSENTHAL: Okay, thank you.

11 THE COURT: That was my -- maybe it's my mistake.

12 MR. ROSENTHAL: We've been working with everybody --

13 THE COURT: But I'm not going to enter an order today
14 because the DIP lender, under circumstances of this case, says
15 you can't have two or three more days. I want that to be very
16 clear.

17 MR. ROSENTHAL: We understand that, Your Honor. We
18 understand that.

19 MR. KEENAN: Your Honor, if I may? This is Paul
20 Keenan. That's not our intention.

21 THE COURT: Well, that's what I heard from Proskauer.

22 MR. KEENAN: I understand, Your Honor.

23 THE COURT: The DIP lender was prepared -- and I
24 quote; was I correct -- am I quoting you correctly -- prepared
25 to call a default today if we don't have an order today. Is

1 that what I heard?

2 MR. THOMAS: Your Honor, that's what was communicated
3 to me --

4 THE COURT: Well, I certainly --

5 MR. THOMAS: -- and that's why I'm here with --

6 THE COURT: -- would be happy to --

7 MR. THOMAS: -- four witnesses.

8 THE COURT: -- hear to the contrary from counsel for
9 the DIP lender.

10 MR. ROSENTHAL: Your Honor, the documents speak for
11 themselves, in that if we didn't have a bid procedures order
12 today, it would be a default under the loan documents.

13 THE COURT: You want to call a default, then we're
14 back to a liquidation.

15 MR. ROSENTHAL: And just because we may notice a
16 default and reserve rights, doesn't mean --

17 THE COURT: No --

18 MR. ROSENTHAL: -- we're going to liquidate.

19 THE COURT: -- no. You notice a default. This is
20 supposed to be an ongoing business. Your client notices a
21 default, it will suffer the consequences.

22 MR. ROSENTHAL: Understood, Your Honor.

23 THE COURT: And if you tell the Court and the
24 committee they can't have another day or they can't have until
25 next Tuesday, you can do so. You can rely on your papers. But

1 this case will not be off to a very good start.

2 MR. ROSENTHAL: We understand, Your Honor.

3 THE COURT: All right. Let's start over again.

4 MR. THOMAS: Your Honor, there are four open issues
5 that we have not, since last night, been able to resolve with
6 the committee, although we're confident that with time, we will
7 be able to run those issues to ground. We just couldn't do it
8 since we received the objection last night.

9 We have addressed numerous other issues. But let's
10 just talk about the four that haven't been resolved. The first
11 one is the issue of whether or not the sale procedures, in
12 essence, should be continued seven days; a seven-day extension
13 of the bid deadline and a seven-day extension of the auction.
14 The committee is --

15 THE COURT: And other than the fact that your DIP
16 lender, your lender, who has bought into this case just a few
17 months ago, tells you it wants it on a certain day, why
18 shouldn't we adjourn seven days?

19 MR. THOMAS: Your Honor, I think we would have to --

20 THE COURT: Give me a good business reason why not to
21 adjourn seven days.

22 MR. THOMAS: The only business reason, Your Honor, is
23 whether or not the company can continue to finance its going-
24 concern operations for an additional seven days. And we --

25 THE COURT: We don't even know, as we sit here today,

1 as I read the papers, whether this is a liquidation sale or
2 this is a going-concern sale, do we?

3 MR. THOMAS: You are correct, Your Honor. And I
4 believe I --

5 THE COURT: Now -- and I don't necessarily
6 understand -- the committee may understand better than I do,
7 exactly what's going on here. Now, maybe -- this is the first
8 time, as I said, I'm asking questions about this particular
9 aspect of the transaction. You've lived with it longer than I
10 have. But tell me, exactly what is the interest that your CEO
11 has in the intellectual property of this debtor? He owns it?

12 MR. THOMAS: No. The CEO has no interest, no
13 ownership, in any assets of the debtors' estate.

14 THE COURT: Then what is this new company he
15 supposedly is going to form and has to get financing for?

16 MR. THOMAS: Your Honor -- and I believe I had
17 discussed this on the November 5th telephonic hearing, but I
18 might not, and I --

19 THE COURT: Well, the telephonic hearing is not a very
20 effective way. It certainly wasn't effective to convey to me
21 some of the aspects of this financing.

22 MR. THOMAS: Your Honor, and --

23 THE COURT: Or of this transaction.

24 MR. THOMAS: Your Honor, so the situation is -- and
25 again, we would -- are able to put on evidence at the

1 appropriate time, and if now's not the appropriate time --

2 THE COURT: If it is --

3 MR. THOMAS: -- understood --

4 THE COURT: -- or it isn't --

5 MR. THOMAS: -- under --

6 THE COURT: -- the DIP lender's telling me it's either
7 today or they'll call a default. That's what I hear.

8 MR. ROSENTHAL: Your Honor, we've agreed to punt this
9 to next week.

10 THE COURT: Well --

11 MR. ROSENTHAL: We have an agreement with the
12 committee on the dates --

13 THE COURT: Well, then --

14 MR. ROSENTHAL: -- and how this is --

15 THE COURT: -- why wasn't I told that?

16 MR. ROSENTHAL: I'm not --

17 MR. KEENAN: Your Honor --

18 MR. ROSENTHAL: -- I'm not running the hearing.

19 MR. KEENAN: -- this is Paul Keenan. I'd just
20 disagree with the characterizations by Proskauer on this issue.
21 We're not striving to shut down the company if the order isn't
22 entered today. We never made that threat.

23 THE COURT: Well --

24 MR. KEENAN: We want to push for it to be ordered, but
25 we never said that we would shut the company down --

1 THE COURT: You've either agreed --

2 MR. KEENAN: -- and I apologize if --

3 THE COURT: -- to put this off -- all right. Maybe
4 the committee can throw some light on this issue.

5 MR. KUGLER: Let me help. We have been working very,
6 very hard. And Mr. Rosenthal is correct that as to the four
7 live issues in the bid procedures motion, we have agreed to put
8 those off until the 29th, which is the date that the other
9 motions have all been continued to, with the full expectation
10 that we're going to be able to work through those issue between
11 now and then.

12 THE COURT: Well, that's a different -- that's a
13 little bit different -- it sounds a little bit different than
14 what I was just told by counsel for the debtors. Okay?

15 MR. KUGLER: That agreement has been -- we reached
16 that --

17 THE COURT: Are the debtors in the loop?

18 MR. KUGLER: Yes, they are, Your Honor.

19 MR. THOMAS: We're in the loop since the last few
20 hours. That proposal we --

21 THE COURT: Well, then why are you standing here
22 telling me you're going to push for an order today?

23 MR. THOMAS: Your Honor, I'm -- because last night
24 when we proposed that this matter be continued to resolve
25 certain issues, we were told, in no uncertain terms, that there

1 would be no agreement, and that's why I flew from Chicago to
2 New York, to be prepared with witnesses. We wouldn't have
3 flown out here, okay. And it wasn't until a few hours ago --

4 THE COURT: Don't tell me about flying to New York. I
5 don't want to hear about that in the future. I don't know why
6 this case is being run out of Chicago. It's one of the many
7 unknown aspects of this case that I don't understand and that
8 confuse me. So don't -- I want to prevent you from having to
9 fly to New York any more than necessary. I want to have the
10 hearing today so you can get home and counsel for the committee
11 can get home for Thanksgiving. But don't tell me about flying
12 to New York.

13 MR. THOMAS: I won't.

14 THE COURT: Maybe you can explain at a proper time why
15 this case isn't being run out of New York. That's for another
16 day. This is a New York company, isn't it?

17 MR. THOMAS: The headquarters are in Manhattan.

18 THE COURT: All right. That's what I thought. All
19 right, now go on. Just --

20 MR. THOMAS: Back to the -- back to the transaction --

21 THE COURT: Yes.

22 MR. THOMAS: -- Your Honor. We have in court Mr.
23 Douglas Williams, who's the CEO. I'm not offering any
24 testimony. I'm just -- I want to answer and let you know who's
25 here. We have Mr. Michael O'Hara, who's the independent

1 director that was appointed August 14th, 2012. We have Mr.
2 Geoffrey Richards, a managing director of Blair, who has been
3 running a sale process.

4 THE COURT: All at great expense, when I don't know if
5 we'll need any of that testimony, at least today. Although,
6 perhaps we should put Mr. O'Hara on the stand so he can tell me
7 who's running this company. You tell me in the papers that Mr.
8 O'Hara is running the company, at least in terms of plan
9 formulation and other matters.

10 MR. THOMAS: He is running --

11 THE COURT: And the reason I ask is that I do not
12 understand -- and let's go back to where we were -- maybe you
13 can explain to me exactly what Mr. Williams' position is in the
14 purchase or sale of the assets of this business?

15 MR. THOMAS: Your Honor, during the sale process,
16 there was -- all of the assets of the debtors were offered for
17 sale. There were confidential offering memoranda, there were
18 teaser letters, there was a data room. Indications of interest
19 came in. Not a single credible offer was made by a third party
20 to buy the business in its entirety, as a going concern. There
21 were many liquidators that were interested in putting in
22 liquidation bids.

23 There were several entities that specialize in buying
24 brands and trademarks. They were willing to buy the trademarks
25 and allow an operating company to continue the operation of the

1 facilities, continue to run the factories, and continue to
2 employ the employees, pursuant to a license agreement, which
3 had not been negotiated. So the license transaction was the
4 only potential transaction that could preserve the jobs and a
5 going concern.

6 In the months leading up to the filing on October
7 19th, the debtors, with Blair leading a sale process, and Mr.
8 O'Hara, the independent director, being responsible for the
9 decisions and the ultimate decisions on behalf of the board for
10 the sale process, engaged in negotiations with the stalking-
11 horse bidders. And the stalking-horse bid that is before Your
12 Honor has two potential transactions. There's a potential
13 going-concern transaction, but there is a noncontingent,
14 certain liquidation bid.

15 And the debtors, with Mr. O'Hara, the independent
16 director, and the investment banker, chose this stalking horse,
17 because it was the only option that could potentially preserve
18 a going-concern bid. The going-concern option has two major
19 contingencies, which may or may not be fulfilled, both of which
20 involve Mr. Williams, the CEO.

21 The reason -- well, those two contingencies are:
22 whether or not the stalking-horse bidder can reach a license
23 agreement whereby they will own the IP and license it back to
24 an operating entity that will operate the business, design the
25 clothes, manufacture the clothes, and sell the clothes. The

1 other contingency is whether or not Mr. Williams and that
2 potential operating business will be able to obtain sufficient
3 financing, in the sole discretion of the IP buyer, so that the
4 IP buyer knows that its licensing company is viable and has the
5 wherewithal to manufacture the licensed product that the IP
6 buyer is purchasing.

7 Mr. Williams has reached an agreement on a license
8 agreement with the stalking-horse purchaser, which license
9 agreement was posted in the data room. Mr. Williams will
10 testify that he's ready, willing, and able to talk to any other
11 bidder that wants to try to do a transaction that preserves the
12 going concern. And the debtors are still out marketing. If
13 any bidder is out there that wants to buy the whole company and
14 operate the whole company, that is the result the union wants.
15 That's a result the debtors are completely in favor of.

16 But right now, the only option to avoid a liquidation
17 is a potential bid that splits the intellectual property from
18 the operating assets because the IP buyers -- and there are at
19 least three of them -- do not want to take ownership, title, or
20 control of real estate, manufacturing facilities, and step into
21 union contracts.

22 So Mr. Williams' role is if he can obtain financing
23 and we can obtain an IP buyer that agrees on a license
24 agreement, he hopes to maintain the going concern and preserve
25 the jobs. Because the liquidators are not going to assume the

1 collective bargaining agreements.

2 Mr. Williams would testify and has told people that if
3 this going-concern option comes to fruition, he intends to
4 assume the collective -- the debtors would assume and assign
5 the collective bargaining agreements. There would not be a
6 change in the terms of the collective bargaining agreements.

7 He still needs to get his financing. And he hasn't
8 obtained the financing. And when he obtains financing, the IP
9 buyer, in its sole discretion, will determine whether it's
10 satisfactory. So we're not standing here saying we have a
11 going-concern sale. But Mr. O'Hara and Mr. Blair (sic) and Mr.
12 Williams would testify that the collective judgment and the
13 ultimate decision was the independent director's, Mr. O'Hara.
14 The decision was, it was in the best interests of the debtors,
15 their vendors, their customers, and all of their employees to
16 enter Chapter 11 with a stalking-horse bid that had a potential
17 option for a going-concern transaction, as opposed to picking a
18 stalking-horse bid that was a flat-out liquidation bid.

19 We think in a flat-out liquidation, the senior secured
20 lender would be paid off easily. But we would be in a case
21 now, thirty days going on sixty days; we have the union already
22 not happy that we haven't found a going-concern buyer. But we
23 would have been before Your Honor on a liquidation stalking-
24 horse bid. The damage to the brands, the damage to the going-
25 concern operations, the inability to buy product and service

1 our customers, would have been irreparable, we believe.

2 Now, that is the potential transaction. It's not an
3 insider transaction, unless and until Mr. Williams obtains
4 financing satisfactory to any third-party IP buyer, in their
5 sole and absolute discretion. Your Honor, the rug can be
6 yanked out from under the going-concern bid. It's not within
7 the debtors' or Mr. Williams' control.

8 THE COURT: I gather, though, that a little bit of
9 extra time would not hurt Mr. Williams' effort to find
10 financing?

11 MR. THOMAS: That probably is the case, Your Honor.
12 I'm not working on that financing.

13 THE COURT: We have his counsel here.

14 MR. THOMAS: Oh, I'm sorry.

15 THE COURT: Why don't you -- all right. Why don't you
16 stay back -- you don't have to --

17 MR. HALPERIN: It's force of habit.

18 THE COURT: All right.

19 MR. HALPERIN: It's respect for the Court. And I
20 apologize. Alan Halperin; Halperin Battaglia Raicht, on behalf
21 of Mr. Williams.

22 Judge, it goes a little further than that. First, I
23 just want to make sure this is clear. Mr. Williams -- and this
24 predates my involvement -- but he stepped up after there were
25 no other options, after there were no other potential going-

1 concern options. I want that to be clear. It's not like
2 jumped in and tried to shove someone aside. He stepped in when
3 there were no other options, to try and keep this thing alive.

4 Now, I'm not going to stand here and --

5 THE COURT: That's news to me, and I'm glad to hear
6 it.

7 MR. HALPERIN: Okay. And I wanted to make sure that
8 got out there.

9 THE COURT: Assuming, of course, it's the case.

10 MR. HALPERIN: You've got --

11 THE COURT: But I'm certainly glad.

12 MR. HALPERIN: -- an attorney's representation now,
13 and I'm --

14 THE COURT: It's the first time I've heard it. Maybe
15 part of the problem is that I wasn't here on first day, and I
16 could have asked some of the questions that I have.

17 MR. HALPERIN: And, listen, this case didn't start
18 under the easiest of circumstance, given everything that was
19 going on.

20 THE COURT: So I understand.

21 MR. HALPERIN: And it's been a -- it's been rough
22 road.

23 THE COURT: And it's number two.

24 MR. HALPERIN: But as a practical matter, I'm not
25 going to stand here and profess that he's here as a saint, only

1 looking to do eleemosynary tasks. He clearly sees this as a
2 potential opportunity for something to work. But please, let's
3 make sure the record is also clear, he's not looking at this as
4 a cash cow. He thinks it might work, and he saw no other
5 opportunity to keep the going-concern going. And he agreed to
6 step up and try to put an operation -- and OpCo piece together,
7 to pair with the IPCo, the IP pieces, of the bids --

8 THE COURT: All right.

9 MR. HALPERIN: -- there were available.

10 The debtor selected a stalking horse. Mr. Williams
11 agreed that he would be willing to work with them if he could
12 get his side together, meaning work out an agreeable license
13 agreement and work out his own financing. He's working very
14 hard at that right now.

15 The license agreement was posted to a data room. I
16 just want to be clear; I don't think it's a hundred percent
17 lock-down, solid, final. It's close. The material terms are
18 done. But I think there was some noodling around the edges
19 that we still have to do, yet we wanted to make sure that
20 something that was close got into the data room, so other
21 people that were looking could look at it if they wanted to
22 work with him.

23 The other thing, and the thing that I thought was
24 really important, is that if a bidder comes in tomorrow and
25 says I don't want to work with Mr. Williams, I want to just do

1 a liquidation bid and I'm going to throw a gazillion dollars,
2 and the estate says that's the right thing to do, God bless;
3 they can do that. That's within their discretion, and he has
4 no part in the decision-making process. If someone else comes
5 in and says --

6 THE COURT: That's news to me, too.

7 MR. HALPERIN: If someone else comes in and says I
8 want to do an OpCo, and I've got my own operator, and I think
9 my guy is the greatest thing since sliced bread; see ya, Doug.
10 God bless. They can do that, too. This is purely to put
11 optionality in and to preserve a business that we think works
12 if it had proper financing, meaning it had enough. It didn't
13 have enough. Things never got out of the gate right, from what
14 I understand from the prior bankruptcy.

15 He thinks he can do it right. If he does it right, he
16 saves jobs. Mr. Thomas --

17 THE COURT: What is, as you understand it, SKNL? Does
18 Mr. Williams have any interest in SKNL?

19 MR. HALPERIN: I don't know what it is, but I'm told
20 no.

21 UNIDENTIFIED SPEAKER: No, Your Honor.

22 MR. HALPERIN: None.

23 THE COURT: All right.

24 MR. HALPERIN: And so just so this is clear, he's
25 talking about taking as much of the business, as is, without

1 harming anybody, taking the union contracts, taking them as is.
2 He's not looking for modifications. There's a health and
3 welfare plan which I was talking with counsel earlier, maybe
4 it's underfunded, maybe it's not; it's a multiemployer plan.
5 He doesn't care. He's taking that in place and leaving it as
6 is and assuming that at the NewCo. He's trying to make this as
7 seamless as possible and keep the business together. The
8 estate has full optionality. He's out of the decision-making
9 process. Whatever is going to happen is going to happen. And
10 he's putting tremendous amount of his personal effort into
11 trying to make this happen. And that's all it is.

12 THE COURT: All right.

13 MR. THOMAS: Your Honor, SKNL is an Indian publicly
14 traded company. And in 2009, the predecessor to this company
15 had its own Chapter 11, and SKNL put together the entity that
16 bought the assets out of bankruptcy. After their purchase,
17 they did a search and found Mr. Williams and brought Mr.
18 Williams in as the CEO of this debtor entity. He doesn't have
19 an equity interest. SKNL is the ultimate owner of ninety-five
20 percent of the equity of the debtors' ultimate parent company.

21 The business plan -- and Mr. Williams could testify --
22 the business plan, when SKNL bought this company in 2009, was
23 to infuse forty-five million dollars of equity into the entity
24 so it could grow and invest and be successful. That money
25 wasn't infused. Ultimately, maybe less than half of that money

1 came in as subordinated debt. And our first-day declaration
2 reflects the subordinated debt that the equity holder put into
3 the company.

4 They are not here in the courtroom. And when we
5 defaulted in July of 2012, because we didn't do a refinancing
6 and we didn't take out Wells Fargo Bank and JPMorgan Chase, who
7 are original senior secured lenders, we defaulted because we
8 had a third-party lender, Salus, who's now our DIP lender, who
9 was ready, willing, and able to provide the financing. And a
10 condition of the financing, in July 2012, was that SKNL infuse
11 another fifteen million dollars. So they were going to infuse
12 equity. We were going to get third-party debt. We were going
13 to pay off Wells Fargo. And we would have ample liquidity from
14 that equity infusion.

15 That equity infusion, notwithstanding written evidence
16 of funds, did not occur. We went into default in July of 2012.
17 And Wells Fargo seriously constrained our liquidity and was
18 pushing us towards a liquidation. And Salus then came in in
19 August 14th and bought out Wells' position and stepped into
20 their shoes, provided us additional liquidity, provided SKNL an
21 additional eight or so days -- so they'd gone from July 15th to
22 August 22nd to make the equity infusion; gave them more time to
23 make the equity infusion. Again, the equity infusion didn't
24 come in.

25 Salus required, when they came in -- because they knew

1 this story; they had been looking at this company since the
2 spring -- they required the debtors to retain an independent
3 director who would have sole control over all decisions
4 regarding a sale or a bankruptcy. And the reason was, the
5 debtors' board was controlled by SKNL. And the new lender did
6 not want to give them the opportunity to control governance and
7 to keep stifling what was going on with the company.

8 So the independent director requirement was a
9 requirement of Salus, who took out Wells and provided us
10 additional liquidity. They also provided that there would be
11 sale milestones, but that if the SKNL promised funds came in,
12 the sale would stop and the independent director would go away.
13 Since the money didn't come in, the sale proceeded -- the
14 process proceeded on August 15th, over three months ago.

15 And the debtors, with William Blair, the investment
16 banker, with the assistance of Mr. O'Hara, the independent
17 director, have done a -- we think, a very thorough marketing
18 process. The committee isn't there yet, because they've only
19 been around for three days. We --

20 THE COURT: I know that. And that certainly is the
21 source of many of my comments. Tell me what -- you said there
22 were four issues --

23 MR. THOMAS: Yes. Your Hon --

24 THE COURT: -- that were still open. One is a --

25 MR. THOMAS: Extension.

1 THE COURT: -- seven-day extension.

2 MR. THOMAS: Correct.

3 THE COURT: All right.

4 MR. THOMAS: Yes, Your Honor.

5 THE COURT: The second issue?

6 MR. THOMAS: The second issue is the committee is
7 objecting to the breakup fee awarded to the stalking-horse
8 bidder; has commenced discussions with the stalking-horse
9 bidder. The way I read the objection is, I think, they were
10 saying the breakup fee plus expense reimbursement should not
11 exceed three percent of the purchase price. But that issue is
12 open and has not been resolved.

13 THE COURT: All right.

14 MR. THOMAS: I believe that if we have some time and
15 negotiate in good faith, we will resolve that issue, because
16 the parties aren't that far apart.

17 THE COURT: Let me only say this about the breakup
18 fee. I make no comment about its size or whether there are
19 particular reasons for a breakup fee that exceeds three
20 percent, which is sometimes used as a rule of thumb, but not
21 invariably. As I understand it, this breakup fee is a
22 permanent credit for the benefit of the stalking-horse bidder.
23 Even if the stalking-horse bidder takes the property at the end
24 of bidding, if the stalking-horse bidder outbids other
25 competing bidders who come in and bid up the amount from the

1 current amount to some higher amount, the stalking-horse bidder
2 is still entitled to the breakup fee. Is that correct?

3 MR. THOMAS: No, Your Honor.

4 THE COURT: It's not? Okay.

5 MR. THOMAS: That is not --

6 THE COURT: Because there was some language in some of
7 the papers that confused me. And you said on the telephone --
8 and again, it's very hard to fully follow the arguments on the
9 telephone, at least for me.

10 MR. THOMAS: Me, too.

11 THE COURT: It seemed to be that there was some kind
12 of a credit that you were talking about for the benefit of the
13 stalking-horse bidder.

14 MR. THOMAS: Your Honor, I put the language regarding
15 a -- the breakup fee would be credited against the stalking-
16 horse bid, because the local rules apparently require that
17 language to go in. And honestly, I don't -- I don't really
18 believe in that language --

19 THE COURT: I don't either. You'll have to --

20 MR. THOMAS: But I thought I had to abide by --

21 THE COURT: -- you'll have to give me the cite --

22 MR. THOMAS: -- the local rules.

23 THE COURT: -- and we ought to look at it. But --

24 MR. THOMAS: Okay.

25 THE COURT: -- thank you for doing that. It may be

1 that lawyers from Chicago are the only people who ever look at
2 local rules. I'm sure Mr. Halperin will tell me --

3 MR. HALPERIN: I think --

4 THE COURT: -- he hasn't read them in years.

5 MR. HALPERIN: I haven't. But I think the ref --
6 fortunately I have very smart people that I work with that keep
7 me out of trouble. But I think the reference is because when
8 you're going back and forth, you give the stalking-horse bidder
9 credit for the amount of the breakup fee, because if a
10 successful bidder outbid them, that amount would have to go out
11 the door to them.

12 THE COURT: Yes.

13 MR. HALPERIN: So it's only in the back-and-forth.

14 MR. THOMAS: That is --

15 THE COURT: I think what it means is that the
16 stalking-horse breakup fee is paid out of the cash that comes
17 in from the opposing bidder. I think that's all it means. I
18 know in this case, you're giving the stalking-horse bidder a
19 superpriority claim as well. And that's really a question, it
20 seems to me, for the DIP lender. And if the DIP lender wants
21 to do that, it's more evidence of the fact that they are,
22 contrary to some of my initial, perhaps unfair remarks, a
23 gentleman and scholars.

24 MR. THOMAS: Your Honor --

25 MR. ROSENTHAL: I'll take the gentlemen -- I'll take

1 the gentleman, Your Honor. Let's not go too far.

2 MR. THOMAS: Your Honor, the breakup fee is only
3 earned upon closing or consummation of an alternative
4 transaction.

5 THE COURT: Right.

6 MR. THOMAS: So therefore --

7 THE COURT: Okay. That's my quest --

8 MR. THOMAS: Right.

9 THE COURT: -- so you've answered that question.
10 Okay. So the committee's concerned about the size of the
11 breakup fee.

12 MR. KUGLER: Yes.

13 THE COURT: And number three?

14 MR. THOMAS: Number three, Your Honor, is in the
15 stalking-horse agreement, I told you earlier, there were two
16 conditions to the potential going-concern transaction with Mr.
17 Williams as CEO setting up a new operating company. Condition
18 one -- actually, both conditions had the same time line. The
19 conditions were that three business days prior to the auction,
20 that Mr. -- the new OpCo would have entered into a license
21 agreement acceptable to the IP buyer, and also three business
22 days prior to the auction, the new OpCo would have provided
23 financing satisfactory to the IP buyer.

24 We believe that the license agreement provision has
25 been satisfied. We posted it. I guess there's still a few

1 moving pieces, but when I -- that happened -- that negotiation
2 took place between Mr. Williams and the stalking-horse bidder.
3 And it's completed well before the deadline. The financing is
4 still being worked on.

5 On the existing bid deadlines of December 6th for a
6 bid deadline, December 19th for an auction, the financing would
7 have to be satisfied on December 5th, the day before the bid
8 deadline. The committee has raised an issue in their objection
9 where they think the financing should be satisfied fourteen
10 business days before the auction, which would be this coming
11 Monday.

12 We are talking about that. We believe that in
13 auctions, and in 363 sales, Your Honor, it's ordinary and
14 customary that qualified bidders have their financial
15 wherewithal qualified on the bid deadline. And by trying to
16 potentially force a qualification a couple weeks in advance of
17 the bid deadline, we may lose a potential qualified bidder just
18 because of the timing. That's an issue.

19 We talked about it today. The committee and its newly
20 hired, although not technically engaged by the Court, financial
21 advisor, would like to sit down with Mr. Williams to discuss
22 the status of his financing. We're here. We will do so after
23 court. And Mr. Williams, again, has said, if I get that
24 financing, I'll make that financing available to any other
25 bidder that wants to preserve the going concern and wants to do

1 the structure of the going-concern bid in the Authentic Brands
2 stalking-horse purchase agreement. So that's an issue we
3 haven't resolved.

4 THE COURT: Mr. Halperin wishes to put in a few words.

5 MR. HALPERIN: I'm sorry, Your Honor. I do need to
6 qualify this. Mr. Williams is not agreeing in advance to work
7 with anybody. He's going to talk to anybody that's interested,
8 make sure it's someone that he can work with going forward.
9 That I want to be clear on. But once he gets his piece
10 together, he's happy to talk to anybody that wants to talk with
11 him. And if someone doesn't want to talk to him, like I said
12 before, God bless.

13 THE COURT: All right. All right, number four?

14 MR. THOMAS: And --

15 THE COURT: Issue number four?

16 MR. THOMAS: -- to be clear, also, Mr. Williams does
17 not have any exclusivity agreement, no lock-up agreement. He
18 is not locked up with anybody. So that goes to -- number four,
19 Your Honor, is the committee raised an issue and they sought
20 clarification of whether or not -- and it's on page 9, bullet 1
21 of their objection -- whether or not there is a "discount"
22 available for the stalking-horse purchaser.

23 We're going to work on providing that clarification.
24 We do not believe that there's any discount available for the
25 stalking-horse purchaser. We don't believe that there's any

1 discount that would be available for the benefit of the
2 stalking-horse purchaser that wouldn't be available for any
3 other potential bidder.

4 THE COURT: Discount against what? Now, that may have
5 been also why --

6 MR. THOMAS: Yes.

7 THE COURT: -- I felt that you were giving some kind
8 of a credit to the stalking-horse bidder with regard to the
9 breakup fee. But you told me that that is not correct. So I
10 don't -- perhaps the committee can tell me what -- where they
11 find the discount.

12 MR. KUGLER: Boy, that's an excellent question, Your
13 Honor. And I wish I could tell you. That really is part of
14 the problem. We've asked the question now five times, and
15 we've heard very good explanations, but they don't always tie
16 out. And then upon arrival at court today, I heard another
17 explanation which didn't tie out whatsoever. So we have some
18 work to do on this issue in terms of clarity. And frankly,
19 that's the -- the committee wants to have the clarity. And
20 it's important for other bidders to understand exactly what
21 they're getting into and what they can bid on and what the
22 rules of the game will be.

23 So as I stand here, I can't tell you exactly what the
24 issue is. And that's why we've agreed on the extension.

25 MR. ROSENTHAL: Your Honor?

1 THE COURT: Counsel for the lender.

2 MR. ROSENTHAL: Thank you, Your Honor. Jeff Rosenthal
3 on behalf of Salus Capital. I understand there's some dispute
4 about this at the current time, because apparently the side
5 letter may not be as clear. But the side letter was filed with
6 the Court as part of the docket.

7 When Salus bought this loan, we received -- we bought
8 it at a discount from Wells Fargo and the other lenders. As
9 part of the -- in order to encourage a transaction and in order
10 to benefit, we thought, the estate -- and I understand there's
11 an ob -- ABG may have a different view of this -- that we would
12 give them a three million dollar discount off the payoff
13 when -- at the time of the closing, if it closed at the
14 stalking-horse bid.

15 For every dollar over the original stalking-horse bid
16 plus the expense reimbursement and the breakup fee, for every
17 dollar above that, we share that, fifty cents each, between the
18 estates and Salus, so that if we get to six million dollars,
19 Salus has paid the three million dollar discount, and the
20 debtor gets the three million dollars. So -- but on day one,
21 we're -- our intention was that the debtors' estates got an
22 extra three million dollars from this transaction. And they
23 realized our discount, not us. Okay?

24 MR. JANG: Your Honor, just -- Chun Jang of DLA Piper
25 on behalf of Authentic Brands. I don't want to remain silent

1 to -- so that my silence is somehow understood as being
2 acquiescence. But I think Mr. Thomas' point, the second part,
3 we didn't anticipate this being an exclusive discount to the
4 stalking-horse bidder. But we did expect that the discount --
5 and originally, this was actually in the APA. For whatever
6 reason, it got reduced to a side letter. But we completely
7 understood the discount to apply to the purchase price. And
8 then going forward, additional overbids from that point, the
9 increments above the initial bid, it would be split fifty-fifty
10 to Salus and the debtors.

11 THE COURT: It doesn't really matter to you where your
12 money goes, as long as you get clean title.

13 MR. JANG: Correct, Your Honor.

14 THE COURT: All right.

15 MR. THOMAS: Right. And, Your Honor, we did file this
16 letter. It was docket number 114. And we're going to have to
17 get a meeting of the minds as to whether there's any ambiguity.

18 THE COURT: I --

19 MR. THOMAS: But it's not the --

20 THE COURT: I don't -- from what I just heard, I don't
21 know that there's any lack of common understanding as to the
22 intent. And let's just be sure that the documents so provide.

23 MR. THOMAS: And that's what we will be working
24 towards between now and the next hearing on bid procedures, so
25 we can resolve these four issues that the committee --

1 THE COURT: Now --

2 MR. THOMAS: -- has raised.

3 THE COURT: -- now, the parties talked, perhaps
4 without commitment, to putting this off until our hearing next
5 Thursday. Is that correct?

6 MR. ROSENTHAL: That's correct, Your Honor.

7 THE COURT: Is that the date that makes sense?

8 MR. ROSENTHAL: Yes, Your Honor. Our agreement was
9 these four issues would remain open, but the bid procedures
10 order would be entered as marked up with the items that we
11 could agree to.

12 THE COURT: All right.

13 MR. ROSENTHAL: I guess we should make clear that the
14 29th would not be a status conference but would actually be, I
15 guess, a --

16 THE COURT: Final.

17 MR. ROSENTHAL: -- continued hear -- or a final
18 hearing with regard to that.

19 THE COURT: I think counsel has explained, there was
20 an order. This is an opening of issues for the committee
21 because of the hurricane. And I remember you telling me what
22 happened to your house in New Jersey.

23 MR. ROSENTHAL: Demolition started today.

24 THE COURT: I remember that very clearly. So maybe we
25 should turn, at this point, to the financing order. And

1 although perhaps it would be useful to look at the sale order
2 and I can tell you if I had any other questions. Because
3 obviously, I was under some misapprehension under all the
4 circumstances.

5 I can also take testimony if everyone's here. But I
6 don't know that it would necessarily advance the issues.

7 MR. THOMAS: Your Honor, I've conferred with the
8 committee and counsel for the DIP lender. They don't believe
9 testimony --

10 THE COURT: I'd rather -- they don't believe testimony
11 is necessary.

12 MR. THOMAS: They don't believe testimony is necessary
13 to advance the issues today.

14 THE COURT: I would be happy to give you a conference
15 room as well. But I'm sure you can find a more comfortable one
16 to use while you're all here in New York.

17 MR. THOMAS: And, Your Honor, with respect to the
18 bidding procedures order, I'd be happy to tender to you a
19 blackline reflecting the changes --

20 THE COURT: All right.

21 MR. THOMAS: -- that we've all agreed upon, and then
22 address any other questions or issues you might have.

23 THE COURT: That would be fine.

24 MR. THOMAS: May I approach?

25 THE COURT: Thank you.

1 MR. THOMAS: Your Honor, should we flip pages? Is --

2 THE COURT: Well, I see a lot of -- many pages are --
3 many provisions are deleted.

4 MR. THOMAS: Yes, Your Honor, because what we have
5 provided -- it's on the bottom of page 2 -- is that -- on the
6 top of page 2 -- that this order is amending certain provisions
7 of the prior order --

8 THE COURT: All right.

9 MR. THOMAS: -- which is docket number 104. And
10 provisions not amended shall remain in full force and effect.
11 So we deleted a lot of provisions that required us to take
12 actions, which we've taken, within a certain amount of business
13 days after docket number 104 was entered.

14 THE COURT: All right. Whatever is easier to
15 understand for the stalking-horse bidder and any other
16 prospective bidders who don't have counsel, so at least
17 everyone can understand what is --

18 MR. THOMAS: Your Honor, I think I can --

19 THE COURT: -- what's going on.

20 MR. THOMAS: -- walk you through the substantive
21 provisions of the blackline. I think the first substantive
22 provision is on page 10.

23 THE COURT: All right.

24 MR. THOMAS: And that is a provision that we agreed
25 upon with the committee that, in essence, any bidder will have

1 to determine, prior to the conclusion of the auction, whether
2 or not they are going to exclude contracts. So they have to
3 come in a few days earlier with their list of assumed
4 contracts. But we all need to know before the auction is over
5 what every bidder's final list of assumed and excluded
6 contracts are, because that impacts the size of the unsecured
7 creditor pool.

8 THE COURT: Okay.

9 MR. THOMAS: And, Your Honor, starting on page 11, we
10 just make it clear that the debtors' rights are after
11 consultation with the committee. So debtors' rights to amend
12 or modify procedures, rules, et cetera, are after consultation
13 with the committee. Those are the changes to the order,
14 although we will, Your Honor, at the conclusion of this
15 hearing, change paragraph 1 to provide that this will be
16 continued to the next hearing date. And we are going to
17 identify the four remaining issues that will be at issue.

18 Your Honor, the bidding proc --

19 THE COURT: Now, can you tell me anything about the
20 status of other parties' interest in the assets and access to a
21 data room and so forth?

22 MR. THOMAS: Your Honor, I can. And again, we have
23 Mr. Richards of Blair. But -- he will correct me if I'm
24 wrong -- Your Honor, since the no-shop provision expired on
25 November 5th, the debtors have published notice of the sale.

1 We've given notice to 6,000 creditors. We've also reached out
2 to approximately 200 potential parties that had potentially
3 been interested.

4 We have ten -- not less than ten parties that have
5 expressed a renewed interest, including several parties that
6 had been interested prior to the filing, who had not been
7 chosen as the stalking horse.

8 We have the data room up and running. We are
9 refreshing it on a daily basis. Whenever a bidder has a
10 diligence question, we put that information in the data room
11 and all bidders get notice that there's been an addition to the
12 data room.

13 The debtors, with William Blair, have had site visits.
14 And we have a calendar back here somewhere where potential
15 bidders have been able to visit the Rochester facility, the Des
16 Plaines, Illinois facility, and the headquarters facility, and
17 have met with senior management to discuss issues relating to
18 their bids, questions that they have. And it's an ongoing,
19 daily process. We worked all weekend with a bidder to provide
20 additional intellectual property diligence and to provide
21 additional diligence regarding contracts, accounts receivable,
22 and inventory.

23 So the debtors -- and I should back up. The person
24 that has the final say in this process is the independent
25 director. Mr. Williams is the CEO. If people want to talk to

1 him, they can talk to him. But he does not have the corporate
2 governance authority to determine diligence issues, sale
3 process issues, or bankruptcy issues. And everyone thinks
4 that's the appropriate way to go, given the potentiality of a
5 going-concern bid.

6 THE COURT: All right.

7 Yes, sir? If you wish to talk to counsel, that's
8 fine, or if you --

9 MR. RICHARDS: This is --

10 THE COURT: -- wish to make a statement, just state
11 your name for the record.

12 MR. RICHARDS: Geoffrey Richards, Your Honor, the
13 company's proposed investment banker.

14 THE COURT: Does that get picked upon the machine?

15 If you'd just come forward? You can speak from the
16 table or from the podium, whatever.

17 MR. RICHARDS: Thank you, Your Honor.

18 THE COURT: Just get a little closer to the
19 microphone.

20 MR. RICHARDS: Thank you, Your Honor. Geoffrey
21 Richards, again, from William Blair, the company's proposed
22 investment banker. In addition to the comments that Mr. Thomas
23 made, some additional data points that may be helpful.

24 We have an online data room that contains more than
25 560 different documents. That online data room has been live

1 since the "exclusivity" was lifted, in conjunction with the
2 designation of the stalking-horse bid.

3 We have been in contact with all -- as Mr. Thomas
4 indicated -- 187 parties who were part of our initial process.
5 In addition to those parties, there have been roughly another
6 two to three dozen other parties that we have contacted or have
7 contacted us, who have signed up NDAs and are actively engaged
8 in the process, both in terms of on-site diligence meetings,
9 multiple telephone conferences that are taking place, multiple
10 site visits.

11 In fact, there's some taking place today and some will
12 be taking place tomorrow, being chaperoned by several of my
13 colleagues from our firm, in an effort to ensure that maximum
14 bidder interest is stimulated, in an effort to drive to as many
15 possible bids as we could get coming up to the -- what right
16 now is the proposed bid deadline.

17 So I wanted to amplify the comments that Mr. Thomas
18 had made to help provide Your Honor a little more color
19 regarding the efforts that are being undertaken, really, seven
20 days a week, almost twenty-four hours a day, with the different
21 parties who previously had expressed interest and additional
22 parties that have come in as a consequence of the company being
23 inside Chapter 11.

24 THE COURT: Do you think another week would be useful?

25 MR. RICHARDS: I think, Your Honor, another week may

1 be helpful to the process. We certainly haven't heard from any
2 of the bidders who have been part of the process that they
3 would need additional time. And to the extent that we had
4 heard that, we certainly would have communicated that to
5 company counsel as well as the independent director. So we
6 haven't heard that so far from any of the parties.

7 To the extent that we would, we of course would convey
8 that to the extent the parties felt that they needed that
9 additional time to participate in a robust way at the auction.
10 But we have not yet heard that from potential bidders.

11 THE COURT: Thank you.

12 MR. RICHARDS: You're welcome.

13 MR. THOMAS: And, Your Honor, so in the actual bidding
14 procedures which were Exhibit A to the amended order, we added
15 language requested by the committee. We've had it cleared by
16 counsel for the DIP lender and counsel for the stalking-horse
17 bidder. Consultation rights, we also made it clear that the
18 purchased assets constitute all the assets required to purchase
19 the debtors' business as a going concern. There was a concern
20 that we're not marketing and selling the business as a going
21 concern. We are. And we specifically talk about the
22 categories of assets that constitute the going concern:
23 intellectual property assets, working capital assets, operating
24 assets, and other assets.

25 THE COURT: All right.

1 MR. THOMAS: That is, I think, the conclusion on the
2 proposed amended bid procedures order.

3 THE COURT: All right. Shall we turn -- does anyone
4 wish to be heard with regard to the bid procedures?

5 All right. We should then turn to the DIP financing
6 order.

7 MR. THOMAS: Sure. Your Honor, I think the Office of
8 the U.S. Trustee wanted us to make a statement on the record
9 regarding the privacy policy.

10 THE COURT: All right.

11 MR. THOMAS: The debtors have reviewed their privacy
12 policies, have shared those policies with the Office of the
13 U.S. Trustee, and have concluded that there is no need for a
14 privacy ombudsman in this matter.

15 THE COURT: All right. Thank you.

16 MR. KHODOROVSKY: Your Honor, if I may briefly respond
17 to what Mr. Thomas just said?

18 THE COURT: Go ahead.

19 MR. KHODOROVSKY: I'll be extremely brief, Your Honor.
20 I agree with what Mr. Thomas said. The U.S. Trustee had an
21 opportunity to review the policy. It appears that the policy,
22 as currently exists, permits the sharing of personal
23 information upon a sale of corporate assets. So at this point,
24 it appears that an ombudsman would not be necessary.
25 However -- and this is not for today, Your Honor -- the U.S.

1 Trustee would insist that any potential purchaser of the
2 company agree to abide by the privacy policy on a current
3 basis. Thank you, Your Honor.

4 THE COURT: All right. All right.

5 MR. THOMAS: Your Honor, with respect to the final
6 debtor-in-possession financing order, if I may approach, I can
7 provide you a blackline against the final order that was filed
8 as docket number 140.

9 THE COURT: Okay. Thank you.

10 MR. THOMAS: And, Your Honor, there are -- the
11 changes, which really start at page 6, are changes that address
12 each and every objection that the committee has. Page 6, it
13 just makes clear that the validity and priority stipulation is
14 subject to the challenge period that the committee has. And
15 the challenge period is set forth in paragraph 13.

16 THE COURT: Right.

17 MR. THOMAS: Next is on page 10. And the committee
18 negotiated a provision with respect to the payment of the
19 collateral monitoring fee.

20 THE COURT: But not the --

21 MR. THOMAS: They actually did get some --

22 THE COURT: -- the other fee?

23 MR. THOMAS: -- they did -- there is a provision, Your
24 Honor, on page 12.

25 THE COURT: All right. And while we're on page 10,

1 I'm looking at -- my notes are on the blackline version of
2 docket 140. So you have to bear with me for a moment. Going
3 back to page 9, what are the dates set forth in termination
4 date are extended to December 19 and November 19? How does
5 that work? And I'm not sure that any of this works against my
6 version of the ratif -- is there an amended ratification and
7 amended agreement on file?

8 MR. THOMAS: No, Your Honor. The order purports --

9 THE COURT: All right.

10 MR. THOMAS: -- to change the dates that are in the
11 ratification agreement. And really, the November 19th date
12 relates to the sale of the Coppley assets.

13 UNIDENTIFIED SPEAKER: Correct, Your Honor.

14 MR. THOMAS: And Your Honor, that was approved, we
15 believe --

16 THE COURT: Right, no, I was there.

17 MR. THOMAS: -- that's clo -- we believe that's
18 closing tomorrow.

19 THE COURT: All right.

20 MR. THOMAS: December 19th, right now, is sort of the
21 outside termination date of the DIP facility, which is
22 triggered off of our existing dates on a bid deadline auction
23 and sale hearing, which are December 6, 10, and 13,
24 respectively.

25 THE COURT: All right. Well, I will assume that there

1 will be some sort of a resolution of the committee's request
2 for a one-week extension, that the dates in here are going to
3 be consistent with that, and the parties are going to work in
4 good faith and reasonably to try to get an appropriate period.
5 And it seems to me critical, not only to give Mr. Williams
6 enough time to get financing, but to get information to the
7 marketplace.

8 Yes, sir?

9 MR. ROSENTHAL: Your Honor, at the bottom of page 10
10 in the redline --

11 THE COURT: Yes.

12 MR. ROSENTHAL: -- that's exactly what that sentence
13 does that we added, was to punt the dates in here --

14 THE COURT: Oh, that's exactly what I was looking for.

15 MR. ROSENTHAL: There you go.

16 THE COURT: Thank you.

17 MR. THOMAS: Your Honor, the other fee that the
18 committee objected to, sort of I'd say the commitment fee, is
19 addressed on page 12, where in essence, it would be reduced by
20 100,000 dollars.

21 MR. ROSENTHAL: Your Honor, for accounting purposes,
22 the way we did this was upon the closing or a refinancing of
23 the Salus loan, we would agree to give the estate a 100,000-
24 dollar discount or payment, however we work it out. But
25 basically we're giving them back 100,000 dollars of the

1 original fee --

2 THE COURT: All right.

3 MR. ROSENTHAL: -- for the DIP loan.

4 THE COURT: All right. Now, it seems to me that your
5 proviso on page 11, limiting the rights of landlords to some
6 specific landlords who objected, has to be broader. I can't --
7 as far as I'm concerned, I can't override lease agreements
8 contrary to their provisions or contrary to applicable law. So
9 I've never done that. I always take that out of DIP orders.

10 Marshall Huebner has told me that I can do it, and he
11 has a memo that says I can do it. But I've never seen the
12 memo. I'd just as soon not see the memo. I don't think I can
13 do it. So I'd just like to make that "all landlords" on the
14 bottom of page 11.

15 You can get a lien on proceeds, but --

16 MR. ROSENTHAL: Okay.

17 THE COURT: -- not on the lease.

18 MR. ROSENTHAL: Okay.

19 THE COURT: All right, thank you. Page -- all right.

20 MR. THOMAS: Your Honor, the committee and the DIP
21 lender agreed at the end of -- on my blackline that I tendered,
22 on page 13, the end of paragraph 5, to provide a dollar amount
23 to be used for investigation into potential claims.

24 THE COURT: All right. But certainly the committee
25 can go further if it wishes. But it has to do so on its own

1 nickel or on property that's not subject to the lien.

2 MR. THOMAS: Right. Your Honor, on page 14 of the
3 blackline, on paragraph 6, the committee also has a veto, as it
4 were, into the payment of any critical vendors.

5 THE COURT: All right. I can assure parties that it
6 will be very hard to get the Court to approve critical vendor
7 payments. On the other hand, if you set up a working group
8 made up of a representative of the debtors, the DIP lender, the
9 committee, and perhaps the U.S. Trustee -- if the U.S. Trustee
10 wishes to be involved -- I'll certainly consider it. But this
11 case is moving so quickly that it seems to me that if they're
12 truly critical vendors, they may get satisfied soon enough,
13 hopefully, in a going-concern sale. Maybe not. But we will
14 see.

15 There is a reference in paragraph 6 to material
16 deviations in the budget. I assume that there have been none
17 so far. Is that correct?

18 MR. THOMAS: None so far, to my knowledge.

19 MR. ROSENTHAL: None that I'm aware of.

20 THE COURT: Okay. All right.

21 MR. ROSENTHAL: Your Honor, the reason is, the first
22 test period is November 16th. So we just finished --

23 THE COURT: All right.

24 MR. ROSENTHAL: -- the first. I don't even know that
25 we've gotten the deviation report yet.

1 THE COURT: Well, let us hope that there are none.

2 MR. THOMAS: Yes, let's hope we're not reporting on
3 the 29th. Your Honor --

4 THE COURT: We are not granting a lien in causes of
5 action arising under Chapter 5 of the Bankruptcy Code.

6 MR. THOMAS: Correct. That has been given up.

7 THE COURT: All right. Thank you.

8 MR. THOMAS: Your Honor, on our blackline, again, on
9 page 18 it reflects the carve-out for the investigation.

10 THE COURT: All right.

11 MR. THOMAS: And on page 19, provides with sort of
12 notice and an opportunity to object to the payment of fees of
13 DIP lender's counsel.

14 THE COURT: All right. I certainly don't think that
15 the information provided need include confidential information,
16 but it should include some information on hourly work done.
17 All right?

18 MR. THOMAS: Your Honor, there's an addition on the
19 bottom of page 20 going to page 21, where there's a limit of
20 the lender's liability. It makes it clear that that is still
21 subject to the challenge period. So the committee has its
22 right to investigate and challenge, including this agreement.

23 THE COURT: All right.

24 MR. THOMAS: I believe that on paragraph 13 it was
25 just made a little bit clearer that the debtors and the lenders

1 agree that the committee has standing to assert any challenges
2 that it uncovers during the challenge period.

3 THE COURT: That's certainly --

4 MR. ROSENTHAL: We went a little further, Your Honor.
5 We actually waived any ability to protest that they don't have
6 standing to challenge their standing.

7 THE COURT: All right. Thank you. That's certainly a
8 good way to proceed. I wish everyone would proceed that way.

9 MR. THOMAS: Your Honor, and that is the extent of the
10 agreed revisions that resolves the objection of the committee
11 which was at docket number 153.

12 MR. ROSENTHAL: There's one more provision, Your
13 Honor, that I don't think was highlighted but is in here that,
14 as part of the original loan, we did not take any liens on real
15 estate. It was all encumbered. We didn't think there was any
16 equity in it. As part of the DIP loan and the DIP order, we
17 did get a blanket lien on all assets, including anything that
18 we didn't encumber before. So pursuant to the DIP order --

19 THE COURT: But junior to existing liens.

20 MR. ROSENTHAL: Junior to existing liens. So we got
21 a -- we sort of got a wraparound on all the real estate. We've
22 agreed to dial back our collateral and give back the real
23 estate as -- at least from our lien will not attach to the real
24 estate that's owned by the debtor.

25 THE COURT: All right. Thank you.

1 Now, there seems -- if I recall correctly, there's
2 some release language in the ratification and amendment
3 agreement. The debtor can properly stipulate to perfection and
4 nonavaila -- nonavoidable and the like. But I don't think they
5 can release -- and I'm looking at paragraph 12 as -- pardon me,
6 paragraph 20 on page 27. And it seems to me that even subject
7 to paragraph 13, I'm not comfortable with the release language.

8 MR. ROSENTHAL: Your Honor, these were releases that
9 were given all along by the debtor, pre-petition, and again in
10 the ratification agreement, which are sort of standard releases
11 given to a lender who's extending new money to a borrower. We
12 should at least get releases that we're not going to get sued
13 by the person we just gave money to.

14 THE COURT: Certainly -- that's fine with regard to
15 the post-petition financing. Does this include the pre-
16 petition financing as well?

17 MR. ROSENTHAL: Well, we have releases in those
18 documents up to the last amendment.

19 THE COURT: I have no problem with a -- I just don't
20 know what a "release" means. Now, if a release doesn't do any
21 more than is provided for in the stipulations included in here,
22 I have no problem with it. It's just that a release is a very
23 broad thing. And that's my concern. But if the parties aren't
24 concerned and don't believe the release goes any further than
25 the stipulations already in the document, I'll leave it alone.

1 All right? If that's understood.

2 I do think -- and this comes up in paragraph 21. And
3 I think we need to strike the words "without the requirement or
4 need to file a proof of claim". I think the secured lender
5 should file a proof of claim. It can file one against all the
6 debtors, or all your borrowers. But I invariably seek --

7 MR. ROSENTHAL: We're happy to do so, Your Honor.

8 THE COURT: All right. Paragraph 24 is a pretty broad
9 statement with regard to 364(e). It seems to me we should say,
10 in the first few words of paragraph 24, "Pursuant and subject
11 to". In other words, all we're doing is ratifying Section
12 364(e). This language goes a little bit further. And those
13 were my very few comments.

14 MR. THOMAS: I believe that is it on the --

15 THE COURT: All right.

16 MR. THOMAS: -- final DIP financing, Your Honor.

17 THE COURT: Anything from any party?

18 All right. I find that the final financing order is
19 reasonable under the circumstances, and that the financing is
20 necessary and appropriate, and in the best interests of the
21 debtor. And I'll sign an order as stated on the record.

22 MR. THOMAS: Thank you, Your Honor. We will submit to
23 your chambers two amended orders to reflect the changes we've
24 been discussing today.

25 THE COURT: All right. And we'll then continue,

1 hopefully, to a final sale order next Thursday.

2 MR. THOMAS: Final bid procedures --

3 THE COURT: Bid procedures order.

4 MR. THOMAS: -- order, Your Honor, on Thursday. I
5 believe we're set at 10 a.m.

6 THE COURT: Okay. Anything further that we ought to
7 accomplish today?

8 MR. THOMAS: I think from the debtors, that's
9 sufficient.

10 THE COURT: All right. Thank you very much.

11 MR. THOMAS: Thank you, Your Honor. Have a happy
12 Thanksgiving.

13 THE COURT: Same to all present and those on the
14 telephone as well.

15 (Whereupon these proceedings were concluded at 3:50 PM)

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I N D E X

RULINGS

	Page	Line
Debtors' financing motion is approved as	57	21
amended on the record.		

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C E R T I F I C A T I O N

I, Penina Wolicki, certify that the foregoing transcript is a true and accurate record of the proceedings.

Penina Wolicki

PENINA WOLICKI

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700 West 192nd Street, Suite #607

New York, NY 10040

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